Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of: IMPLEMENTATION OF THE CABLE TELEVISION CONSUMER PROTECTION AND COMPETITION ACT OF 1992 DEVELOPMENT OF COMPETITION AND DIVERSITY IN VIDEO PROGRAMMING DISTRIBUTION: SECTION 628(C)(5) OF THE COMMUNICATIONS ACT: SUNSET OF EXCLUSIVE CONTRACT PROHIBITION	MB Docket No. 07-29

REPLY COMMENTS OF DIRECTV, INC.

The Commission has only one task before it in this proceeding – to determine whether to extend the prohibition on certain exclusive carriage contracts set forth in Section 628 of the Communications Act. As described in DIRECTV's initial comments, this provision does not prohibit all exclusive carriage arrangements – it prohibits only those between cable operators and cable-affiliated programmers. This is because, when it enacted Section 628, Congress was concerned about the *combination* of market power (exercised, then and now, by cable operators) and vertical integration. It was this combination, Congress reasoned, that would allow cable operators to use programming to sustain and defend their market power.

The vast majority of comments addressed the question before the Commission – *i.e.*, whether or not to extend Section 628's exclusivity ban. And the vast majority of

those agreed with DIRECTV that the Commission should extend the ban. A handful of commenters, however, argued that the Commission ought to create a new exclusivity ban out of whole cloth, restricting exclusives to entities other than cable operators and including programming other than that which is owned by cable operators.

These suggestions go beyond the clear confines of the statute and the Commission should reject them out of hand. Congress created a very limited, very specific prohibition on exclusivity that applies by its terms only to arrangements between cable operators and vertically integrated programmers. The Commission has no authority to expand these statutory restrictions. Moreover, any attempt to do so would be contrary to the deliberate Congressional choice to enact a narrow ban. Congress explicitly found that exclusive arrangements between MVPDs without market power and unaffiliated programmers could help, not harm, competition. The Commission should not second guess that choice.

DISCUSSION

I. This Proceeding Concerns Only Certain Exclusive Arrangements.

Section 628 of the Communications Act is very specific. It prohibits only certain parties – "cable operator[s]," and "satellite cable programming vendor[s] in which a cable operator has an attributable interest," and "satellite broadcast programming vendor[s]" – from engaging in unfair practices.[1] More specifically, it prohibits only certain exclusive carriage arrangements – those "between a cable operator and a satellite cable programming vendor in which a cable operator has an attributable interest or a satellite broadcast programming vendor in which a cable operator has an attributable interest."[2]

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[1] 47 U.S.C. § 548(b).

[2] 47 U.S.C. § 548(c)(2)(D) (for areas served by a cable operator); *see also* 47 U.S.C. § 548(c)(2)(C) (for areas unserved by a cable operator).

Section 628's prohibition on exclusivity is specific for a reason. As described in DIRECTV's initial comments, Congress never considered exclusivity *per se* to be anticompetitive.[3] Congress found, however, that, because cable operators possess market power, programmers affiliated with those cable operators could harm emerging competition by withholding affiliated programming from cable's rivals.[4] Congress thus prohibited exclusive arrangements between cable operators (that is, entities with market power) and programmers "vertically integrated" with cable operators (that is, entities that would have the incentive to enter into exclusive arrangements for anticompetitive reasons).[5]

The principal subject of this proceeding is whether or not to extend Congress's specific prohibition against exclusive arrangements between cable operators and cable-affiliated programmers.[6] The vast majority of commenters limited their arguments regarding exclusivity to this subject. And the vast majority of those agreed with DIRECTV that the Commission should in fact extend Section 628's exclusivity ban for at

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[3] S. Rpt. No. 102-92 (June 28, 1991) ("Senate Report") (stating that the Senate Commerce Committee "believes that exclusivity can be a legitimate business strategy where there is effective competition").

[4] Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 2(a)(5), 106 Stat. 1460-1 (1992) ("1992 Cable Act") ("The cable industry has become vertically integrated; cable operators and cable programmers often have common ownership. As a result, cable operators have the incentive and ability to favor their affiliated programmers. . . . Vertically integrated program suppliers also have the incentive and ability to favor their affiliated cable operators over nonaffiliated cable operators and program distributors using other technologies.").

[5] 47 U.S.C. §§ 548(c)(2)(C) (for areas unserved by a cable operator), 548(c)(2)(D) (for areas served by a cable operator).

[6] 47 U.S.C. § 548(c)(5); *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, Notice of Proposed Rulemaking, ¶ 1 (2007) ("Section 628(c)(5) [of the Communications Act] directed that this prohibition on exclusive programming contracts would cease to be effective on October 5, 2002, unless the Commission found that such prohibition 'continues to be necessary to preserve and protect competition and diversity in the distribution of video programming….' The Commission provided that, during the year before the expiration of the 5-year term, a review would again be undertaken to determine whether the exclusivity prohibition continues to be necessary to preserve and protect competition and diversity in the distribution of video programming. This *Notice* initiates that review."). The Commission also, on its own accord, seeks comment on certain procedural aspects of the program access rules. *Id.*

least an additional five years.[7] DIRECTV believes that its initial comments sufficiently respond to those who argue that cable no longer possesses the incentive or ability to harm competition by locking up key programming, and so will not repeat those arguments here.[8]

A small handful of commenters, however, urge the Commission to go beyond the confines of both the statute and this proceeding. The Commission, they argue, should not only extend the Congressionally-mandated exclusivity ban, but should create an entirely new exclusivity ban. RCN's comments are typical in this regard. RCN argues that all sports programming (not simply home-town sports programming) is "must have" from an MVPD's standpoint.[9] It argues that there is no competitive difference between (1) a cable operator directing its affiliated programmer not to negotiate with cable's rivals, and (2) a programmer unaffiliated with any distributor selling its programming exclusively

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[7] *See*, *e.g.*, SBA Comments at 4; RICA Comments at 3; OPASTCO/ITTA Comments at 3; Verizon Comments at 7; SureWest Comments at 1; USTA Comments at 12; NTCA Initial Comments at 3; NRTC Comments at 7; Qwest Comments at 2; EATEL Comments at 2; RCN Comments at 8; ACA Comments at 3; EchoStar Comments at 2; CA2C Comments at 9; BSPA Comments at 2 (each urging extension of the exclusivity ban).

[8] DIRECTV notes, however, that Cablevision claims that *no* programming is sufficiently "must have" to be used in an anticompetitive manner by cable operators with market power, and that competitors aren't really harmed by such activity when it occurs. Cablevision Comments at 18-28. Cablevision spends ten pages – and its economist spends twelve more – repeating every argument the cable industry has raised on this issue in recent years. But the Commission has already found that the "broad array of video programming available to today's video distributors," Cablevision Comments at 18, has nothing to do with the importance of *particular* networks. *See Implementation of the Cable Television Consumer Protection and Competition Act of 1992 – Sunset of Exclusive Contract Prohibition*, 17 FCC Rcd. 12124, 12139 (2002). It has repeatedly, authoritatively, and recently determined that regional sports programming, in particular, is critical to a competitive MVPD's offerings. *See Adelphia Communications Corp., Time Warner Cable Inc., and Comcast Corp.*, 21 FCC Rcd. 8203, 8258-60 (2006) ("*Adelphia Order*"). And it made this latter determination, in part, based on empirical findings that, where cable-affiliated programmers have withheld such programming, competitive penetration is far lower than it otherwise would be. *Id.* at 8270-71. In each case, the Commission made this determination in the face of exactly the same arguments Cablevision and its economist raise here. Cablevision provides no reason for the Commission to revisit the explicit and repeated findings it has made nearly annually from 1992 to the present.

[9] RCN Comments at 14.

through an arms-length negotiation.[10] And it argues that the Commission possesses sweeping authority to write new rules to reach the latter case.[11] These new rules, argues RCN, should apply to all "must have" programming (affiliated or not with a cable operator) and to "other MVPDs" regardless of their market position.[12]

As discussed below, the Commission lacks legal authority to create program access rules of this type. As Congress recognized in drafting a narrow ban, the proposals suggested by RCN and others would harm, not help, competition. The Commission thus should not rewrite the program access rules.

II. The Commission Lacks Legal Authority To Rewrite the Exclusivity Ban.

The prohibition found in Section 628(c)(2)(D) is very specific. It applies *only* to contracts between, on the one hand, "cable operators" and, on the other hand, programmers vertically integrated with cable operators.[13] Plainly, the text of Section 628(c)(2)(D) itself provides no authority to regulate other exclusive arrangements.

Proponents of new regulation are therefore left to find such authority in other places. RCN goes so far as to make the wholly implausible argument that satellite operators *are* cable operators.[14] Of course, if that were the case, the exclusivity ban would already apply to DIRECTV. However, DIRECTV indisputably is not a "cable operator" as that term is defined in the Communications Act – it does not "provide cable

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[10] RCN Comments at 13 ("Simply put, it is just as damaging to new entrants if an incumbent has the size and resources to lock up an exclusive third party contract for 'must have' programming as it is for that incumbent to buy the source of that programming and then exclude competitors from accessing it.").

[11] *Id*. at 17.

[12] *Id*.

[13] 47 U.S.C. § 548(c)(2)(D).

[14] RCN Comments at 17 n.48 ("For purposes of this prohibition, RCN submits that satellite operators should be considered a 'cable operator.'").

service" over a "cable system."[15] Undeterred, RCN argues in the alternative that "even if" DIRECTV is not a cable operator (as if there could possibly be any question), it ought to be treated as one for purposes of the exclusivity ban.[16] But the definition of "cable operator" applies "for purposes of this title" – that is, Title VI of the Communications Act, which includes the exclusivity ban.[17] Thus, Congress has spoken explicitly on this matter in a manner that forecloses RCN's fanciful contentions.

Proponents also argue that, even if *Section 628(c)(2)(D)* doesn't authorize a new exclusivity ban, such authority can be divined from the broader "unfair competition" provision of *Section 628(b),* and the corresponding directive that the Commission establish regulations to enforce that provision.[18] But Section 628(b) does not prohibit "unfair competition" generally. It prohibits only "unfair competition" of the kind that concerned Congress in 1992 – that is, unfair competition by cable operators and vertically integrated programmers.[19] Regulations "to specify particular conduct that is prohibited by [Section 628(b)]"[20] cannot, by definition, reach conduct that is *not* prohibited by Section 628(b).

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15 47 U.S.C. § 522(5) ("For purposes of this title . . . the term 'cable operator' means any person or group of persons (A) who provides cable service over a cable system and directly or through one or more affiliates owns a significant interest in such cable system, or (B) who otherwise controls or is responsible for, through any arrangement, the management and operation of such a cable system").

16 RCN Comments at 17 n.48.

17 47 U.S.C. § 522.

18 *See, e.g.,* RCN Comments at 16 ("Clearly, there is no indication in Section 628 that the prohibition on unfair competition was meant to be limited to a prohibition on practices with respect to program access distributed by vendors affiliated with MVPDs – or, indeed even to program access abuses generally.").

19 47 U.S.C. § 548(b) ("It shall be unlawful ***for a cable operator, a satellite cable programming vendor in which a cable operator has an attributable interest, or a satellite broadcast programming vendor*** to engage in unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming distributor from providing satellite cable programming or satellite broadcast programming to subscribers or consumers.") (emphasis added).

20 47 U.S.C. § 548(c)(1).

Proponents finally argue that, even if Section 628 does not provide the Commission authority to create a new exclusivity ban, the Commission has "ancillary jurisdiction" to do so.[21] But an assertion of ancillary jurisdiction would be entirely inappropriate in these circumstances. Congress considered the merits of a broader exclusivity ban in 1992, but chose instead to impose only a limited ban.[22] Indeed, Congress specifically recognized that, in contrast to the exclusive arrangements subject to the ban, exclusive arrangements between entities without market power and unaffiliated programmers could be a critical tool to help *promote* competition.[23] Where, as here, "[a]fter originally entertaining the possibility of providing the FCC with authority to adopt . . . rules, Congress declined to do so," Congress's "silence surely cannot be read as ambiguity resulting in delegated authority to the FCC to promulgate the disputed regulations."[24]

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[21] Commenters cite principally to 47 U.S.C. § 154(i), which provides that "the Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions." *See* RCN Comments at 17. SureWest, in a slightly different context, also cites Sections 201(b) and 303(r) of the Communications Act, which provide, respectively, that the Commission may "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act," and "[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act." SureWest Comments at 8 and 8 n.15.

[22] Chairman Tauzin, the author of the exclusivity ban, made this decision very clear.

> There is an argument against our amendment someone made. The argument is that we no longer allow for exclusive type programs that are important to people who develop a product. Not so. Read the DSG report on our bill. The DSG report clarifies it very well. It says and our amendment says that exclusive programming that is not designed to kill the competition is still permitted. The FCC can grant exclusive programming rights under our amendment.

138 Cong. Rec. H. 6487, 6534 (1992).

[23] The Senate Commerce Committee, when considering a version of the prohibition at issue in this proceeding, stated that it "believes that exclusivity can be a legitimate business strategy" in the absence of market power. *See* Senate Report.

[24] *Motion Picture Ass'n v. FCC*, 309 F.3d 796, 806-07 (D.C. Cir. 2002) (also refusing to find authority under Sections 2(a) and 4(i), in part, because the rules – like the program access rules – "significantly implicate program content"); *see also, e.g.*, *AT&T Corp. v. FCC*, 323 F.3d 1081, 1086 (D.C. Cir. 2003) (rejecting the FCC's anti-slamming rules because "the regulations go beyond the anti-slamming

CONCLUSION

Commenters in this proceeding have amply demonstrated that the Commission should extend Section 628(c)(2)(D)'s exclusivity ban for at least an additional five years. They have not, however, demonstrated that the Commission can or should rewrite that ban to cover entities other than cable operators or programmers not vertically integrated with cable operators. The Commission should extend the existing ban – and only the existing ban.

Respectfully Submitted,

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statute's express terms," and noting that Congress "would have written the statue to prohibit" the slamming practices in question if it had wanted to empower the FCC to regulate them); *FCC v. Midwest Video Corp.*, 440 U.S. 689, 705, 708 (1979) (finding that certain public access rules were outside of the FCC's ancillary jurisdiction because the relevant statutory provisions and legislative history "manifest[] a congressional belief" that such regulation was unwarranted); *cf. American Bar Ass'n v. FTC*, 430 F.3d 457, 468-69 (D.C. Cir. 2005) (finding that the Federal Trade Commission lacked implicit authority to regulate attorneys as financial institutions because the statute in question – the Gramm-Leach-Bliley Act – includes significant detail on the authority delegated to the FTC yet is silent on the FTC's power to regulate attorneys).